

In Confidence

Office of the Minister for COVID-19 Response

Cabinet Legislation Committee

COVID-19 Public Health Response (Extension of Act and Reduction of Powers) Amendment Bill: Approval for Introduction

Proposal

- 1 I seek agreement to introduce the COVID-19 Public Health Response (Extension of Act and Reduction of Powers) Amendment Bill (the Bill) to the House.

Policy

- 2 On 17 October 2022, Cabinet agreed to amend the COVID-19 Public Health Response Act 2020 (the Act) to ensure that legislative powers are available to implement the Post Winter Strategy and Variants of Concern Strategic Framework, while also ensuring the continued COVID-19 powers are proportionate, streamlined and as simple as possible [CAB-22-MIN-0446 refers].
- 3 In accordance with Cabinet's agreement to extend the term of the Act until new pandemic legislation is enacted and reduce the ongoing powers, the attached Bill:
 - 3.1 prevents the Act from expiring on 13 May 2023 and makes the term of the Act open ended
 - 3.2 removes the power for the Director-General of Health to make COVID-19 Orders
 - 3.3 limits the power for the Minister for COVID-19 Response to make COVID-19 Orders to only the following matters:
 - 3.3.1 self-isolation requirements for cases, household contacts and close contacts
 - 3.3.2 mask requirements
 - 3.3.3 pre-departure and/or post arrival testing requirements for travellers to New Zealand
 - 3.3.4 requirements for airline/ship operators to prevent passengers who have not complied with pre-departure travel requirements from travelling to New Zealand

- 3.3.5 requirements for travellers to not board a flight to New Zealand if they are exhibiting COVID-19 symptoms, under a public health direction or currently positive for COVID-19
- 3.3.6 self-isolation and quarantine requirements for people arriving in New Zealand
- 3.3.7 provision of travel history and contact information to support contact tracing
- 3.4 limits the enforcement powers in the Act by removing:
 - 3.4.1 the power for warrantless entry to private dwellings and marae
 - 3.4.2 the power to close roads and public places and stop vehicles
 - 3.4.3 the power to direct a person to produce evidence of compliance with a specified measure.
- 3.5 limits the types of enforcement officers that can be authorised by the Director-General of Health consistent with authorisations used to date,
- 3.6 reduces the maximum penalties applicable to infringement offences and criminal offences upon prosecution as follows:

	Maximum infringement offence penalties		Maximum criminal offence penalties (upon conviction)	
	<i>Infringement fee</i>	<i>Court-imposed fine</i>	<i>Fine</i>	<i>Term of imprisonment</i>
Individual	\$1,000	\$3,000	\$5,000	6 months
Any other person (e.g. businesses, bodies corporate)	\$3,000	\$9,000	\$15,000	-

- 3.7 removes all provisions relating to Managed Isolation and Quarantine Facilities with a transitional provision to preserve the ability to recover existing debts.

Why a bill is required

- 4 The Act and the powers within it will automatically repeal in May 2023 in the absence of a bill to extend the term of the Act. Without these powers, we would need to rely on the generic provisions in the Health Act 1956 (the Health Act) to support the ongoing management of COVID-19. The Health Act powers do not support implementation of all mandatory public health measures identified in the Post Winter Strategy and Variants of Concern Strategic Framework. For example, they do not enable mandatory face mask requirements to be imposed.

5 9(2)(h)



Additional policy decisions

Breach of a requirement on airlines or ship operators to check travellers' compliance with COVID-19 conditions

6 Cabinet agreed to retain the power to make COVID-19 Orders to set requirements for airline/ship operators to prevent passengers from travelling to New Zealand if the passengers have not complied with pre-departure travel requirements. The retention of this power is necessary to ensure that other order making powers Cabinet has also agreed are able to be operationalised. For example, this would include the ability to make Orders to prevent people from boarding a flight to New Zealand if they have symptoms of COVID-19.

7 Currently, the power in the Act that gives effect to this requirement is sufficiently broad to also enable a craft to be denied entry to New Zealand if airline/ship operators have not taken reasonable steps to ensure passengers travelling to New Zealand meet pre-departure requirements. For the avoidance of doubt, I propose that the provisions in the Bill preclude the ability to prevent craft from entering New Zealand. I consider it more proportionate to address this non-compliance using the existing offence and penalty provisions in the Act. I note that any restrictions put in place in future at the border must be consistent with the right of New Zealanders to enter New Zealand as affirmed by the New Zealand Bill of Rights Act 1990.

Commencement of reduced penalty provisions

8 I also propose that provisions in the Bill giving effect to a reduction in penalty levels do not come into force until a date set by Order in Council which I expect to be no later than 15 December 2022. Splitting the commencement of these provisions is necessary now that the Bill proposes to be passed under urgency on 22 and 23 November 2022. An amendment to the COVID-19 Public Health Response (Infringement Offences) Regulations 2021 cannot be made before the Bill comes into force due to the reduced time frames necessary for enacting it under urgency.

9 9(2)(h)



9(2)(h)

Allowing for continued regulation of COVID-19 tests

- 10 I further propose to include a provision in the Bill that would allow for Orders to be made to provide for the ongoing regulation of COVID-19 tests which will facilitate the continued regulation of Point-of-Care tests. Because a positive result from these tests may trigger self-isolation requirements, it is desirable that the Government maintains the ability to ensure these devices are safe and reliable.

Consequential amendment to the Residential Tenancies Act 1986

- 11 I seek agreement to the repeal of Schedule 5 and Section 145 of the Residential Tenancies Act 1986. These provisions were added by the COVID-19 Response (Management Measures) Legislation Act 2021 to support tenants to stay in their rental homes during outbreaks of COVID-19 if a COVID-19 order is made in the future restricting people from moving house (essentially 'lockdowns'). The provisions enable Ministerial Orders to be made to 'switch on' tenancy termination restrictions. Given the power to impose lockdowns is being removed from the Act, there is no reason to continue them in the Residential Tenancies Act.

Allowing Health entities to exercise enforcement powers

- 12 Cabinet agreed on 17 October 2022 to narrow the type of enforcement officers that may be authorised to exercise enforcement powers to specified categories of people [CAB-22-MIN-0446]. Representatives of Health agencies were not included in this list but have played an important role with the enforcement of rules throughout the pandemic to date. I propose to expand the classes of people who may be authorised to exercise enforcement powers to include appropriately qualified and trained workers engaged or employed by Te Whatu Ora – Health New Zealand, and Manatū Hauora.

Ongoing resolution of the House of Representatives to continue the COVID-19 Public Health Response Act

- 13 Finally, I propose that the requirement for the House of Representatives to periodically resolve that the Act remain in force is removed. This is contrary to Cabinet's previous discussions around the safeguards that will remain if the fixed expiry date in the Act is removed and Cabinet's specific noting on 17 October 2022 that repeal provisions in the Act will remain [CAB-22-MIN-0446].
- 14 Having considered this issue further, my view is that as the most contentious and rights limiting powers in the Act will be removed by the Bill, it is no longer proportionate or necessary for Parliament to periodically resolve that the Act

continue. I consider that scrutiny is better directed towards the specific Orders made under the Act, which are subject to their own safeguards and presentation to the House of Representatives, rather than the existence of the Act itself.

- 15 Without automatic repeal provisions, there is a risk that the Act will remain in force longer than is necessary. However, I consider that this risk is true of most legislation and can be managed by Manatū Hauora in accordance with its general Regulatory Stewardship obligations.

Impact analysis

- 16 A Regulatory Impact Statement (RIS) has been prepared to support the Bill and was lodged to support Cabinet's consideration of the policy proposals on 17 October 2022. The RIS is attached again for reference.
- 17 A Manatū Hauora panel reviewed the RIS titled '*Future of the COVID-19 Public Health Response Act 2020*', dated September 2022 and considered the RIS to meet the quality assurance criteria, commenting that it is clear and concise and has a clearly identified policy problem and options.
- 18 The RIS will be published on Manatū Hauora and the Department of the Prime Minister and Cabinet's websites.

The RIS is publicly available here:
www.health.govt.nz/system/files/documents/information-release/ris-redacted-future-of-the-covid19-phr-act.pdf

Compliance

- 19 The Bill complies with each of the following:
- 19.1 the principles of the Treaty of Waitangi;
 - 19.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
 - 19.3 the disclosure statement requirements;
 - 19.4 the principles and guidelines set out in the Privacy Act 2020;
 - 19.5 relevant international standards and obligations including the United Nations Convention on the Rights of Persons with Disabilities;
 - 19.6 the Legislation Guidelines (2021 edition) maintained by the Legislation Design and Advisory Committee.

New Zealand Bill of Rights Act 1990 and Human Rights Act 1993 [Crown Law advice Legally Privileged]

- 20 9(2)(h)
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Consultation

Government departments and public bodies

26 The following agencies were consulted: The Treasury, Ministry for Primary Industries, Ministry of Transport, New Zealand Police, Department of Internal Affairs, Ministry of Foreign Affairs and Trade, Ministry of Justice, MBIE, Ministry of Housing and Urban Development, Department of Corrections, Te Puni Kōkiri, Parliamentary Counsel Office, Crown Law Office, Te Arawhiti, New Zealand Customs Service, Ministry of Education, Whaikaha – Ministry of Disabled People, Te Aka Whai Ora, Te Whatu Ora, Ministry of Social Development, Ministry for Pacific Peoples, Inland Revenue Department, Ministry for Culture and Heritage, Public Service Commission, Ministry for Ethnic Communities, Statistics New Zealand, Oranga Tamariki, Sport New Zealand, Office of the Privacy Commissioner and the National Emergency Management Agency.

Public consultation

27 DPMC officials carried out limited engagement on the policy proposals reflected in the Bill (excluding the additional policy decisions outlined in this paper, which occurred after this engagement). Engagement occurred with the National Iwi Chairs Forum, disability representatives and community groups for Pacific peoples, along with wider stakeholder groups including faith-based community organisations, hospitality groups, the business and retail sector, trade unions, tourism representatives, the aviation and maritime sectors and local government.

28 Overall, most stakeholders indicated support for the narrowing of powers in the Act to improve its proportionality, while retaining the ability to implement a limited set of public health measures. Key concerns raised related to:

28.1 the economic impact on businesses

28.2 the lack of consultation with affected communities when decisions to make or amend COVID-19 Orders occur at pace

- 28.3 minimal lead in time to implement public health restrictions
- 28.4 the potential reputational risk to New Zealand's tourism without clear communication of changes
- 28.5 the risk of lessening public health restrictions on vulnerable populations, including the impact on their participation in society.

Political consultation

- 29 Consultation on this paper and the attached Bill took place between 2 – 8 November 2022 and feedback received is reflected in this paper.

Binding on the Crown

- 30 The Act binds the Crown, and this is not changed by the proposals within the Bill.

Allocation of decision-making powers

- 31 The Bill retains allocation of decision-making powers to the Minister for COVID-19 Response to make COVID-19 Orders.
- 32 The Bill removes allocation of decision-making powers to the Chief Executive of the Ministry of Business, Innovation and Employment related to managed isolation and quarantine and the Director-General of Health in relation to making COVID-19 Orders.

Associated regulations

- 33 The Bill removes the ability to make managed isolation and quarantine charges regulations and undertakes the consequential amendment to revoke the existing COVID-19 Public Health Response (Managed Isolation and Quarantine Charges) Regulations 2020.
- 34 The Bill retains the ability to make regulations to create a sliding scale of infringement offence penalties up to the maximum amounts prescribed in the Act. Consequential amendments are being progressed to the COVID-19 Public Health Response (Infringement Offences) Regulations 2021.

Other instruments

- 35 The Bill retains and amends powers to make other instruments as follows:
 - 35.1 The power for the Minister for COVID-19 Response to make COVID-19 Orders, for a limited range of purposes and subject to the existing safeguards in the Act, to enable the implementation of mandatory public health measures.
 - 35.2 The power to make regulations to graduate infringement offence penalties up to the reduced maximum penalties as amended by the Bill to support proportionality.

Commencement of legislation

- 36 All proposals except for the reduction in maximum penalty levels will come into force following Royal Assent. I propose that the reduction in maximum penalty levels come into force on a date to be established by Order in Council to allow for the COVID-19 Public Health Response (Infringement Offences) Regulations 2021 to be amended. My intention is for this to be no later than 15 December 2022.

Parliamentary stages and next steps

- 37 I propose that the Bill be introduced on 22 November 2022 and passed through all stages under urgency.
- 38 Officials will work with the Parliamentary Counsel Office to draft template amendments to the Act that could be used if powers being removed need to be reinstated urgently.

Proactive Release

- 39 I intend to proactively release this Cabinet paper, excluding legally privileged material and subject to any redactions consistent with the Official Information Act 1982 once the Bill has come into force.

Recommendations

I recommend that the Cabinet Legislation Committee:

- 1 note that the COVID-19 Public Health Response (Extension of Act and Reduction of Powers) Amendment Bill (the Bill) holds a category two priority on the 2022 Legislation Programme, meaning it must be passed before the 2023 general election;
- 2 note that the Bill will ensure that legislative powers to support the management of COVID-19 will remain available beyond the current expiry of the Act in May 2023 as agreed by Cabinet on 17 October 2022; [CAB-22-MIN-0446]
- 3 note that amendments to the Act proposed by the Bill intend to ensure that the legislation that empowers our COVID-19 response is proportionate, streamlined and as simple as possible;

Additional policy decisions

- 4 agree that the power for the Minister for COVID-19 Response to make Orders that impose requirements on airlines or ship operators does **not** include the ability to prevent a craft from entering New Zealand if the associated airline or ship operator has not complied with the requirement to prevent passengers from boarding if the passengers have not complied with pre-departure requirements;

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- 5 agree that it is more proportionate to address non-compliance with the requirement for airlines or ship operators to prevent passengers from boarding if the passenger has not complied with pre-departure requirements using the existing offence and penalty provisions in the Act;
- 6 agree that provisions of the Bill that reduce maximum penalty levels come into force on a date to be established by Order in Council, which I intend to be no later than 15 December 2022;
- 7 agree to include a provision in the Bill to enable the Minister for COVID-19 Response to make Orders to regulate COVID-19 testing;
- 8 agree to repeal of Schedule 5 and Section 145 of the Residential Tenancies Act 1986 as a consequential amendment to the removal of the power to impose lockdowns;
- 9 agree to include appropriately qualified and trained workers engaged or employed by Te Whatu Ora Health New Zealand and Manatū Hauora amongst those that can be authorised to exercise enforcement powers under the Act;
- 10 agree to remove the requirement for Parliament to resolve periodically that the Act remain in force;

Introduction of the Amendment Bill

- 11 approve the COVID-19 Public Health Response (Extension of Act and Reduction of Powers) Amendment Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 12 agree that the Bill be introduced on 22 November 2022;
- 13 agree that the Bill be enacted by 30 November 2022.

Authorised for lodgement

Hon Dr Ayesha Verrall

Minister for COVID-19 Response